IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP NO. 296 OF 2003

Reserved on : 27th June, 2007.
Date of Decision: 16th July, 2007

Prem Singh No. 760060941 HC/GD	Petitioner
Versus	
Union of India and another	Respondents

Coram

The Hon'ble Mr. Justice Sanjay Karol,J.

Whether approved for reporting[1]? Yes.

For the petitioner: Mr.Karan Singh Kanwar, Advocate.

For the respondents: Mr.Rabinder Thakur, Central Govt. Counsel.

Sanjay Karol, J.

By way of present writ petition, petitioner has assailed the impugned order dated 3.5.2002 (Annexure P-10) and 26.10.2002 (Annexure P-11) whereby the services of the petitioner w.e.f. 9.9.1993 to 22.4.2002 have been treated as *dies non* and not taken into account for the purposes of awarding consequential service benefits to him.

On 14.4.1976 petitioner was enrolled as a Constable in 6th Battalion of Indo Tibetan Border Police at Kinnuar and continued to work as such at various places. For the charge of remaining absent from duty with effect from 9.9.1993 to 25.9.1993 under Section 10(m) of the Central Reserve Police Force Act, 1949 (hereinafter referred to as the Act) vide orders dated 15.10.1993 petitioner was convicted and sentenced imprisonment till rising of the Court.

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[1] Whether the reporters of Local Papers are allowed to see the Judgment?

Relying upon the provisions of Sections 9(f) and 10(m) of the Act petitioner was dismissed from service in terms of order dated 15.10.1993. The said order, however, was assailed by him by way of CWP No.927 of 1994 and vide judgment dated 7.9.2001, this Court set aside the said orders of dismissal on the ground that petitioner was neither charged for nor convicted under the provisions of Section 9(f) of the Act and, therefore, same could not have been used as a ground for his dismissal. However, petitioner's conviction under Section 10(m) was not disturbed. The respondents were accordingly directed to pass a fresh order based on the conviction under Section 10(m) of the Act.

Thereafter the respondents reinstated the petitioner in service with immediate effect in terms of its order dated 17.4.2002 and vide orders dated 3.5.2002 he was informed that the period of his absence with effect from 9.9.1993 to 26.9.1993 for 18 days and 27.9.1993 to 15.10.1993 for 19 days, has been directed to be treated as *dies non* for all purposes. However, for his absence from duty w.e.f. 16.10.1993 to 22.4.2002 resulting due to the passing of the order of dismissal from service was to be considered under the provisions of F.R. 54-A and the decision of the Govt. of India. Further, vide orders dated 26.10.2002 petitioner was informed that his period of absence from duty w.e.f. 16.10.1993 to 22.4.2002 has been treated as dies non for all purposes. It is this order which is a subject matter of challenge in these proceedings.

Learned counsel for petitioner has submitted that not only petitioner's dismissal from service was found faulty by this Court but even the respondents have subsequently reinstated him, therefore, he should not be deprived of service benefits for the period 9.9.1993 to 22.4.2002. He has relied upon a decision of Single Bench of Allahabad High Court in case *Mohd. Zakir vs. Union of India*, reported in 1996 (5) SLR 788.

Learned counsel for respondents has, however, supported the order on the ground that since the petitioner has not worked for the said period, he should not be entitled for any benefits.

Undisputably services of the petitioner are governed by the provisions of the Act and also Fundamental Rules framed by the Central Government (hereinafter referred to F.R.). Section 9 prescribes offences which are considered to be "more heinous offences" and Section 10 prescribes offences which are considered to be "less heinous offences. Petitioner has been convicted and sentenced for an offence under Section 10(m), which reads as under:-

> "absents himself without leave, or without sufficient cause overstays leave granted to him"

The prescribed punishment for the said offence is imprisonment, which may extend to one year, or with fine which may extent to three months' pay or with both. In terms of Section 11, Authorised Officer may in lieu of, or in addition to, suspension or dismissal award punishment of reduction in rank; fine of any amount not exceeding one month's pay and allowances; confinement to quarters, lines or camp for a term not exceeding one month; confinement in the quarter-guard for not more than twenty-eight days, with or without punishment drill or extra guard, fatigue or other duty; and removal from any office or distinction or special emolument in the Force. Section 12 empowers the authority to inter alia dismiss and forfeit the pay, allowances and other moneys of a person sentenced to imprisonment. Relevant provisions of Section 13 which deal with deduction of pay and allowances are reproduced as under:-

> "13. Deductions from pay and allowances. – The following penal deductions may be made from the pay and allowances of a member of the Force by his company officer, that is to say, -

(a) all pay and allowances for every day of absence either on desertion or without leave and for every day of imprisonment awarded by a Criminal court or of confinement awarded under section 11;

(b) all pay and allowances for every day whilst he is in custody on a charge for an offence of which he is afterwards convicted;

(c) all pay and allowances for every day on which he is in hospital on account of sickness certified by the medical officer attending on him at the hospital to have been caused by an offence committed by him under this Act;

(d) all pay and allowances ordered to be forfeited under section 11; and

(e) such sum as may be ordered by the Commandant or assistant commandant in order to make good any expenses caused by the member of the Force, or any loss of, or damage or destruction done by him to, any arms, ammunition, equipment, clothing, instrument or decorations belonging to the Force or to any buildings or property."

It is thus clear that petitioner has been convicted and sentenced for less heinous offence under Section 10(m) of the Act i.e. for remaining absent without leave w.e.f. 9.9.1993 to 25.9.1993. He is sentenced for imprisonment till the rising of the Court only. Importantly no order of any fine as envisaged under Section 11 or forfeiture of pay and allowances etc. as envisaged under Section 12 has been passed against him. Pay and allowances for every day of absence without leave alone can be deducted under Section 13(a) of the Act.

In the present case, petitioner is seeking that service benefits be granted with effect from 9.9.1993 till 22.4.2002. In view of specific provisions of Section 13(a) of the Act, petitioner certainly cannot be given any benefit for the period of absence from 9.9.1993 to 25.9.1993 and the

order dated 3.5.2002 cannot be faulted at all. For the period between 27.9.1993 and 15.10.1993, which is period of trial and since the petitioner has admitted his guilt and has been convicted and sentenced no fault can also be found with the order treating this period as *dies non*.

Further, for the period between 16.10.1993 to 22.4.2002 the respondents admittedly did not pass any order under Sections 11,12,13 of the Act and relied upon the provisions of F.R. 54-A to treat the said period also as *dies non.* Order shows that no reasons whatsoever have been assigned by the respondents while passing the impugned order. In the affidavit filed by the respondents, it is clarified that petitioner's case is governed under the provisions of FR 54(1)(a) and (b) and not FR 54-A, which is a typographical mistake.

Since the order of dismissal dated 15.10.1993 was set aside by this Court in CWP No.927 of 2004 and respondents also of their own have reinstated the petitioner in service in terms of its order dated 17.4.2002, I am of the considered view that petitioner ought to have been granted some benefits for continuation of service for the said period.

Certainly petitioner cannot be faulted for passing of an illegal order of dismissal. He has also not delayed any of the proceedings, on the contrary petitioner was forced to approach this Court, to seek redressal of his grievances. Petitioner was charged and convicted for less heinous offence i.e. absenting without leave and was convicted till the rising of the Court only.

No reason whatsoever has been assigned by the respondents in passing the impugned order and even the counter-affidavit is silent, except that the decision to treat the service as dies non has been taken under F.R. 54. The decision in this regard certainly has to be of the respondents, but the same has to be tested on the touchstone of rationality. Petitioner was

wrongly dismissed out of service for no fault of his. In fact the respondents can be solely held responsible for the same Petitioner could not attend the office due to illegal orders passed by the respondents.

However, it is not in dispute that petitioner has been convicted and sentenced to imprisonment. Certainly, the respondents could have taken a harsh view against the petitioner while reviewing its order of dismissal and reinstating the petitioner. Nothing in the Act prohibited the respondents from again dismissing the petitioner from service. Admittedly, petitioner has not worked for the period in question. Therefore, in my view interests of justice would be met if it is directed that petitioner be held entitled for 50% of salary for the said period and for the purpose of seniority and pensionary benefits he would be deemed to be in service with effect from 16.10.1993 itself.

Learned counsel for the respondents submitted that there is alternate equitable remedy available with the petitioner by way of an appeal under Rule 28 of the Central Reserve Police Rules, 1955. The same is, however, disputed by the counsel for the petitioner. Be that as it may, since the matter was admitted on 30.4.2003 and pending hearing before this Hon'ble Court, in the facts and circumstances of the case I am not inclined to go into this question in view of the fact that petitioner has approached this Court not once but twice and left the same open. The writ petition is being decided on merits.

For the foregoing reasons, the writ petition is partly allowed in the aforesaid terms and the impugned order dated 26.10.2002 is quashed. However, there shall be no order as to costs.

16th July, 2007
(C)

(Sanjay Karol)
Judge